In The

Supreme Court of the United States

October Term, 1978

No. 78-583

WILLIAM S. HERRMANN,

Petitioner,

vs.

LEONARD P. MOORE, ABRAHAM M. LINDENBAUM, PAUL WINDELS, WILLARD G. HAMPTON, WILBUR A. LEVIN, MICHAEL CHARLES O'BRIEN, JEROME PRINCE, HOLLIS K. THAYER, M. HENRY MARTUSCELLO, EDWARD THOMPSON, CECILY SELBY, JOHN DOAR, MICHAEL P. SHUMAECKER, ERIC NELSON, BROOKLYN LAW SCHOOL, RAYMOND E. LISLE, GERARD A. GILBRIDE, MILTON GABRIEL GERSHENSON, JOSEPH CREA, SAMUEL HOFFMAN, JOHN J. MEEHAN, PHILIP K. YONGE, RICHARD T. FARRELL, MARTIN R. HAUPTMAN, JEROME M. LEITNER, DAVID G. TRAGER, HENRY MARK HOLZER, OSCAR CHASE, BRIAN E. COMERFORD, RICHARD ALLAN, MARGARET A. BERGER, GEORGE W. JOHNSON, SUSAN M. BRANDT, DEBORAH H. SCHENK, PAUL SHERMAN, GARY A. SCHULTZE, DUSAN DJONOVICH, STEVEN S. ELBAUM AND S. HAL MERCER IV,

Respondents.

Supreme Court, U. S.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Counterstatement of Factual Background 2

Argument:

I. The improper activity of a state judge constituted a deprivation of petitioner's due process rights. The holding of the lower court to the contrary decided a federal question in conflict with applicable decisions of this Court. 3

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

Board of Regents v. Roth, 408 U.S. 564 7

Bradford Audio Corp. v. Pious, 392 F.2d 67 5

Carey v. Piphus, ___ U.S. ___, 55 L. Ed. 2d 252 ..... 6, 7

Davis v. Village Park II Realty Co., 578 F.2d 461 5

Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123 ..... 4, 5, 7

Laird v. Tatum, 408 U.S. 1 5

Statute Cited:

42 U.S.C. §1983 ..... 4, 5, 6, 7

Contents

Page

APPENDIX

Minutes of the Civil Court of the City of New York in Herrmann v. Crea, Index No. 24915/73 ..... 1a

In The

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

This reply brief is submitted on behalf of petitioner, William S. Herrmann, and is addressed to arguments first raised in the respondents' brief in opposition to the petition. It does not address every argument or allegation of respondents but only those which petitioner respectfully thinks are relevant and will aid this Honorable Court in its decision.

COUNTERSTATEMENT OF FACTUAL BACKGROUND

The status of the litigation referred to by defendants in their brief in opposition to the petition for a writ of certiorari are in the following posture before the courts:

1. William S. Herrmann, Jr. v. Joseph Crea, Civil Court of the City of New York, County of Kings, Index No. 24915, terminated when Crea apologized in open court to the petitioner for his slanderous statements. A copy of the minutes of the court containing the apology is reprinted in the appendix to this brief (1a-10a).

2. William S. Herrmann, Jr. v. Brooklyn Law School, et al., Supreme Court, State of New York, County of Kings, Index No. 11364/75, was an action for a temporary injunction. When the temporary injunction was denied the issue became moot. Said case is still pending before the Supreme Court, Kings County.

3. William S. Herrmann v. Raymond E. Lisle, Joseph Crea, Philip K. Yonge and David G. Trager, United States District Court, Eastern District of New York, No. 75 Civ. 130 is awaiting trial before Judge Sifton momentarily.

4. William S. Herrmann v. Brooklyn Law School, Supreme Court, State of New York, County of New York, Index No. 23498/76, is a contract action which is at issue. The preliminary proceedings have been recently completed and it will be presently noticed for trial.

Respondents claim that petitioner was dismissed as a tenured professor from the Brooklyn Law School after the necessary procedural steps were taken to institute a hearing by the full faculty on the trustee petition. In fact, the so-called "hearing" was an inquest held by the respondents without any representation for the petitioner or any evidence being presented

on behalf of the petitioner due to the absence of petitioner's counsel who shortly prior to the hearing was engaged in American Bar Association activities during the annual convention which was being held in Montreal, Canada.

The attorney for the petitioner had written and advised the respondents that he could not be present at the time of the hearing because of these commitments and the resultant lack of time to prepare for the hearing and requested an adjournment. Rather than grant a short, reasonable adjournment, the respondents proceeded without the presence of petitioner's attorney or the petitioner and turned what they allege to be a hearing into an informal discussion with no semblance of either procedural or substantive due process. In essence they held a classic kangaroo court.

ARGUMENT

I.

The improper activity of a state judge constituted a deprivation of petitioner's due process rights. The holding of the lower court to the contrary decided a federal question in conflict with applicable decisions of this Court.

Respondents rely heavily on the fact that "the Court of Appeals' finding (all in Petitioner's favor) as to Justice Thompson's activities with respect to *Herrmann v. Crea*" (Respondents' Brief, p. 19) did not include a finding of "deprivation of any right." (576 F.2d at 456, Petition, p. 11a).

It is respectfully submitted that respondents' reliance on that "finding" is totally misplaced in view of the fact that a judicial officer's unilateral intervention in a case not before him is so unequivocably a deprivation of petitioner's constitutional rights that any holding to the contrary is clearly in direct conflict with applicable decisions of this Court.

Petitioner produced evidence to the effect that Justice Thompson, the administrative judge in charge of the court in which *Herrmann v. Crea* was pending, intervened in that action by speaking to the judge before whom the case was pending, by warning petitioner to drop his suit and by arranging to have the chief law assistant for the civil court accompany a witness, as counsel, in the counterclaim filed against petitioners (576 F.2d 456, *et seq.;* Petition, pp. 8a-11a; Memorandum to File of Dean Lisle, Petition, p. 46a).

The court held that by virtue of the fact that petitioner prevailed on the counterclaim there could have been no "deprivation" by the intimidation exercised by respondents, as such was intended by 42 U.S.C., Section 1983 (*id.*) or by the Due Process Clause of the Constitution.

To argue that the unilateral intercession by a superior judicial official in a case not before him or the intimidation of a litigant is not a deprivation of due process, is to misconstrue not only the meaning of the word "deprivation" but to also misconstrue the conception of "due process."

"Due process" represents and is compounded of "a profound attitude of fairness between man and man, and more particularly between the individual and government . . . and stout confidence in the strength of the democratic faith which we profess." *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, 163, Frankfurter, J. concurring.

To assert that a warning by a state administrative judge* that "your case is going nowhere, I have spoken to Judge Kleiger . . ." (576 F.2d at 455; Petition, p. 9a) is not a

* While arguing that Thompson was not acting in any official capacity respondents also assert that as a justice, Thompson enjoys total immunity (Respondents' Brief, p. 20, note), an inconsistency which is but one of respondents' minor ones.

"deprivation" of the "stout confidence in the strength of the democratic faith" is wholly unrealistic. To allege that such illegal or improper intervention does not deprive one of "that feeling of just treatment" (*Joint Anti-Fascist Refugee Com., supra*) which is the cornerstone of the right to due process, is wholly naive.

The law needs no elaboration that a "chilling" of one's constitutional rights constitutes a deprivation. *Davis v. Village Park II Realty Co.,* 578 F.2d 461.

Citing *Laird v. Tatum,* 408 U.S. 2, respondents assert that no cognizable deprivation is made out. *Laird v. Tatum,* as also *Bradford Audio Corp. v. Pious,* 392 F.2d 67, the other case cited by respondents, are to the extent they are applicable, wholly supportive of petitioner's position.

Laird v. Tatum involved the gathering of information on various individuals by Army Intelligence. Respondents, objecting thereto, conceded that "they complain of no specific action of the Army against them" (408 U.S. 9) and indeed respondents thereat argued that "we're not quite sure exactly what they have in mind and that is precisely what causes the chill." (*Id.* at 408 n. 5.) The Court, quite properly, felt this was too tenuous or speculative a fear.

In the case at bar, petitioner knows exactly what Justice Thompson had in mind, and it is respectfully submitted that nothing could be more chilling.

In *Bradford Audio Corp. v. Pious,* 392 F.2d 67, the Second Circuit dismissed the action, arising essentially out of an alleged infringement of property rights, as not being within the purview of §1983. "To qualify under §1983 the right sought to be enforced must in the main be one incapable of pecuniary evaluation, such as personal liberty, unrelated to and not dependent upon an invasion or deprivation of property interests." (392 F.2d 72).

It is submitted that the rights sought to be enforced in the case at bar fall directly within the scope of the limitations enumerated.

The district court, in holding against petitioner, found there to have been no "damages" as a result of Thompson's actions. Increased legal fees and emotional distress evidently were not considered sufficient damages to merit consideration. *(Herrmann v. Moore, et al.,* ____ F. Supp. 2d ____, Petition, p. 24a). Subsequent to that decision, this Court ruled, in *Carey v. Piphus,* ____ U.S. ____, 55 L. Ed. 2d 252, that §1983 is actionable notwithstanding that there are no actual damages.

The circuit court's affirmance of the lower court decision rested therefore on the premise, based only on a paper record with no trial or hearing ever having been had, that plaintiff-petitioner failed to demonstrate "deprivation" rather than damages.

It is submitted that the court below misconstrued the thrust of *Carey v. Piphus* and simply interpreted "deprivation" as another form of "damages" or as "actual injury" with a concomitant feature of tangibility.

This Court stated in *Carey v. Piphus,* 55 L. Ed. 2d at p. 267:

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed (citing cases) we believe that the denial of procedural due process should be actionable for nominal damages *without proof of actual injury."* (Emphasis added.)

The court below found that ". . . Thompson did not adversely affect that suit . . . . Thus, plaintiff has failed to show, as is

required by 42 U.S.C. §1983 that under color of law he actually 'subjected' plaintiff to the 'deprivation' of any Constitutional rights." (576 F.2d 456; Petition, pp. 10a, 11a).

The lower court thus held "deprivation" to be inextricably linked with "adverse affect," a conclusion which we submit is contrary to the intention of this Court in *Carey v. Piphus, supra,* and in conflict with other applicable decisions of this Court.

Clearly "adverse affect" is legally synonymous at bar with "actual injury." Just as clearly petitioner should have been given the opportunity to present his case even "without proof of actual injury." *(Carey v. Piphus, supra).*

Deprivation of rights afforded under the Due Process Clause, like due process itself, "means many different things in the numerous contexts in which it applies." *Board of Regents v. Roth,* 408 U.S. 564, 590 (Justice Marshall dissenting). "The precise nature of the interest that has been adversely affected, the manner in which this was done, . . . the protection implicit in the office of the functionary whose conduct is challenged . . . these are some of the considerations that must enter into the judicial judgment." *Joint Anti-Fascist Refugee Com. v. McGrath, supra* at 163.

The court below has decided a federal question in a way in conflict with applicable decisions of this Court which it is respectfully submitted calls for the exercise of this Court's discretion.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Dated: New York, New York
November 27, 1978

Respectfully submitted,

s/ John F. Martin
Attorney for Petitioner

APPENDIX

MINUTES OF THE CIVIL COURT OF THE CITY OF NEW YORK IN HERRMANN v. CREA, INDEX NO. 24915/73

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF KINGS

WILLIAM S. HERRMANN, JR.,

Plaintiff,

-against-

JOSEPH CREA,

Defendant.

Index No.

24915/73

TRIAL TERM, PART 26
141 Livingston Street
Brooklyn, New York
June 6, 1977

B e f o r e:

HONORABLE MORGAN LANE, Judge, and a jury of six.

A p p e a r a n c e s:

JOHN F. MARTIN, ESQ.
Attorney for Plaintiff
342 Madison Avenue
New York, N.Y. 10017

Minutes

JOSEPH CREA, ESQ. (Pro se)
250 Joralemon Street
Brooklyn, New York 11201
BY: JEROME M. LEITNER, ESQ., of Counsel
Attorney for Defendant

Joseph A. Penta
Official Court Reporter

[2] Brooklyn, N.Y., June 6, 1977.

THE COURT: May the record show that this stipulation is being put on the record in this matter in the presence of William S. Herrmann, Jr., who is the plaintiff and he is represented by Mr. John F. Martin of 342 Madison Avenue, Manhattan; the [sic] the defendant, Joseph Clea, [sic] who is represented by Mr. Jerome Leitner and whose address is 250 Joralemon Street, Brooklyn.

This matter, which is an action for slander, was brought in, sent into this part, which is a trial part, by Judge Gasper Fasullo, who is conducting the calendar next door.

And the Court had an opportunity of setting with Mr. Martin, John F. Martin, attorney for the plaintiff and Mr. Jerome Leitner, attorney for the defendant, and conferred in this matter [3] with the intention of possibly adjusting this matter to the satisfaction of both sides.

It is ten minutes after 4:00, and I think we will agree that this conference for a possible adjustment started shortly after 2:00 p.m.

MR. MARTIN: Yes.

MR. LEITNER: Precisely.

Minutes

THE COURT: 2:00 p.m. today.

After various negotiations, the Court was able to have both counsel arrive at a statement to be made by the defendant, Joseph Crea, which is going to be made within a few moments, to adjust this matter to the satisfaction of all parties concerned.

And while I'm putting this stipulation on the record, I want to express the Court's commendation to both counsel, shall I say, for their competency in discussing this matter with me in their zealous desire to [4] protect the rights of both their respective clients and adhering to the Court's suggestion and admonition that a matter of this kind would best be solved by an amicable adjustment because of the undue publicity which may arise in the event that this case did go to trial.

The Court, with the cooperation of both counsel, was able to arrive at a statement which the defendant, Joseph Crea is going to make on the record at this time in regard to the possible adjustment of this matter.

Now, Mr. Crea, you have had an opportunity of conferring with counsel, have you not?

THE DEFENDANT: I have.

THE COURT: And you are desirous of making the statement now to the Court and to this party-plaintiff?

THE DEFENDANT: I am.

THE COURT: Please make the statement.

THE DEFENDANT: I apologize for anything that I said regarding William S. Herrmann, Jr. [5] on March 20th, 1973, at a meeting of the faculty at Brooklyn Law School.

THE COURT: Now, the other pertinent parts of this adjustment are as follows:

There is to be no monetary consideration made on behalf of either side, and Mr. William S. Herrmann, Jr. has agreed that there will be no releases to any publication of any kind and the same goes for Mr. Crea, and both sides have agreed that if any inquiry is made in regard to this matter, that both sides in substance will say "That this matter has been adjusted to our mutual satisfaction."

Now, Mr. Leitner, as attorney for the defendant — I want to start with the plaintiff. Mr. Martin, as attorney for the plaintiff, has everything that I put on this record, is that in accordance with your understanding of the settlement of this case?

MR. MARTIN: Yes, it is in accordance with my understanding of the [6] settlement, yes, your Honor.

THE COURT: Is there anything you want to add or supplement in this stipulation?

MR. MARTIN: No, this is perfectly agreeable.

THE COURT: Now, Mr. Leitner, as attorney for the defendant, is everything that's on the record, is that in accordance with your understanding?

MR. LEITNER: Yes, sir. I would like to add —

THE COURT: If there is anything you want to add, submit it to the Court.

MR. LEITNER: I ask this — I'm not sure that it is necessary, but for the sake of completion, I would like to say a few words.

THE COURT: Put it on the record. Let the record be complete.

MR. LEITNER: I would like it to be understood that the school newspaper "Justinian," is included in publications in connection with your admonition a few moments [7] ago, that they are not to be notified by either side. I'm sure that is agreeable.

And I, as counsel to Professor Crea, consider myself bound by the admonitions regarding confidentiality and I am sure that Mr. Martin likewise does, too.

MR. MARTIN: I don't think there is any necessity. I automatically assume that I am bound by it. There is no necessity of expressing it to the Court.

MR. LEITNER: Fine.

THE COURT: Mr. Crea and Mr. Herrmann, you both were in my chambers and all of this was discussed before; is that correct?

THE PLAINTIFF: Yes.

THE DEFENDANT: Yes.

THE COURT: I advised both of you that I am going to put both of you under oath so the record will be complete, so Mr. Herrmann, will you please take the stand.

WILLIAM S. HERRMAN, Jr., 16 Oak Street, Stamford, Connecticut, the plaintiff, called as a witness in his [8] own behalf, being first duly sworn, testified as follows:

EXAMINATION BY

THE COURT:

Q. Now, Mr. Herrmann, sir, so the record will be complete, on or about the 20th day of March, 1973, you were at that time a member of the faculty of the Brooklyn Law School; is that correct? A. That's correct.

Q. And, Mr. Joseph Crea at or about that time was also a member of the Brooklyn Law School? A. That's correct.

Q. And at a meeting of the faculty on that day, some statement was allegedly made by Mr. Crea for which you brought this lawsuit in slander against Mr. Crea; is that correct? A. That's correct.

Q. You have appeared by your attorney, Mr. Martin, and Mr. Crea is appearing here with [9] his attorney, Mr. Leitner; is that correct? A. Correct.

Q. And after negotiations by myself together with your attorneys and Mr. Crea's attorney, a statement was offered by the defendant in regard to the alleged statements that he made on March 20th, 1973 wherein in substance he apologized therefor.

That is being accepted by you in adjustment and full settlement of this matter; is that correct? A. That's correct.

Q. Now, before this stipulation was put on the record, Mr. Martin, as your attorney, had an opportunity of conferring with you, or you with him; is that correct? A. Yes, I did.

Q. In that conference, you advised Mr. Martin that this statement would be satisfactory to you, in full settlement of this matter, period? A. Yes, but I don't know if you —

[10] Q. The ultimate result was that you have accepted this statement and so advised Mr. Martin? A. I have.

Q. Is that correct? A. That's correct.

Q. Now, Mr. Herrmann, part of the agreement also was that this matter — both of you being faculty members of Brooklyn Law School — receive no further publicity, and you agree not to release or give any releases to any publication whatsoever in regard to this adjustment? A. Yes, I agree.

Q. And you further agree in the event any inquiry is made, your statement would be that the matter has been adjusted to our mutual satisfaction? A. I'll refer it to my attorney.

Q. Is everything that has been agreed in this court now on this stipulation? A. As far as I know.

Q. Is there anything you want to add to it? [11] A. No.

Q. Is there anything that is not clear and you want any further advice from the Court? A. No.

THE COURT: Mr. Martin, do you want to ask him any questions?

MR. MARTIN: No.

THE COURT: Mr. Leitner?

MR. LEITNER: No, sir.

THE COURT: Mr. Herrmann, thank you very much.

(The witness was excused from the stand.)

THE COURT: Mr. Crea, please step up here.

JOSEPH CREA, 1551 East 17th Street, Brooklyn, New York, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

EXAMINATION BY

THE COURT:

Q. Mr. Crea, you are the defendant in this action of William S. Herrmann, Jr. against [12] Joseph Crea, wherein you are being sued for an alleged statement which the plaintiff contends was slanderous, on March the 20th, 1973 at a meeting of the faculty in Brooklyn Law School; is that correct? A. That's correct.

Q. You are represented by Mr. Leitner, who is standing here in court; is that correct? A. I am.

Q. And he had an opportunity of conferring with you regarding a possible adjustment in this matter? A. He has, yes.

Q. After conferring with him, you have made a statement in open court, which I'm going to read, wherein you said: "I apologize for anything I said regarding William S. Herrmann, Jr. on March 20th, 1973 at a meeting of the faculty of Brooklyn Law School"; is that correct? A. Yes.

[13] Q. Now, you did make such a statement? A. I admit it.

Q. And this was after you conferred with your attorney, Mr. Leitner? A. That's correct.

Q. Now, the understanding is that this will be in full settlement of this lawsuit against you? A. I so understand.

Q. And you understand that you both agree, both you and Mr. Herrmann, that there will be no publicity, no releases to any publications of any kind in regard to this matter? A. I agree.

Q. And you further agree that if inquiry is made, that your statement in substance will be that the matter has been adjusted to your satisfaction? A. That's correct.

Q. Firstly, is the stipulation in the record in accordance with your understanding? A. It is.

[14] Q. Is it satisfactory? A. Yes, sir.

Q. Is there anything that you want to add? A. I do not.

THE COURT: Mr. Leitner, anything that you want to ask of your client?

MR. LEITNER: No, sir.

THE COURT: Mr. Martin, anything that you want to ask of him?

MR. MARTIN: No.

THE COURT: I ask both of you attorneys if there's anything you want to add to the stipulation and you both said no?

MR. MARTIN: That's correct.

MR. LEITNER: That's correct.

THE COURT: You may step down.

(The witness, Mr. Crea, left the witness stand.)

THE COURT: Gentlemen, the matter is adjusted pursuant to the stipulation on the record, and I want once again to express my [15] commendation sincerely to both you, Mr. Leitner, and Mr. Martin, for assisting in helping the Court in a very conscientious and competent manner in bringing an understanding wherein both of your respective clients have adjusted this matter.

MR. MARTIN: I'd like to thank the Court also for its good offices in helping to effectuate the settlement.

MR. LEITNER: With this particular case with all that was involved, may I express my thanks and my admiration for your skill and efforts for disposing of it so amicably.

THE COURT: Gentlemen, it's a pleasure to be of service to you.

-00000-

CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT OF THE WITHIN MINUTES.

s/ Joseph A. Penta
Joseph A. Penta
Official Court Reporter.